

April 11, 2003

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**
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**DECISION ON REQUESTS FOR RECONSIDERATION
AND
MODIFIED DECISION ON APPEAL OF CONDITIONAL USE PERMIT**

SUBJECT: Department of Development and Environmental Services File No. **L01CU023**

ODELIA PACIFIC FOR VOICESTREAM WIRELESS
Conditional Use Permit Appeal

Location: 28745 Southeast Issaquah-Fall City Road, Fall City

Appellant: Inga Graf McNally and Tim McNally, *represented by*
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King County: Department of Development and Environmental Services
Current Planning Section, *represented by*
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SUMMARY OF RECOMMENDATIONS AND DECISIONS:

Department's Preliminary:	Deny the appeal
Department's Final:	Deny the appeal; modify conditions
Examiner:	Grant the appeal

Examiner (on reconsideration):
PRELIMINARY MATTERS:

Modify the decision

Application submitted:
Notice of appeal received by Examiner:
Statement of appeal received by Examiner:

December 6, 2001
October 14, 2002
October 14, 2002

EXAMINER PROCEEDINGS:

Pre-hearing conference:	December 12, 2002
Hearing opened:	March 4, 2003
Hearing closed:	March 5, 2003
Examiner's decision issued:	March 14, 2003
Examiner's decision withdrawn pending reconsideration:	March 27, 2003

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Office of the King County Hearing Examiner.

ISSUES ADDRESSED:

- Compatibility of minor communications facility (cell tower) in rural area
- Conditional use permit criteria
- Setbacks
- Screening

FINDINGS, CONCLUSIONS AND DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On September 13, 2002, the Department of Development and Environmental Services issued a conditional use report and decision that granted conditional approval to Odelia Pacific, for the construction by VoiceStream Wireless, of a 150' tall monopole with antennae and associated ground equipment. The address of the property for which the permit was granted is 28745 Southeast Issaquah-Fall City Road in unincorporated King County.

A timely appeal of the Department's decision was filed by Inga Graf McNally, on behalf of Tim McNally and herself.

On March 14, 2003, the Examiner issued a decision on the appeal, granting the appeal without prejudice to the right of the Applicant to submit a new application substantially consistent with the setback and screening requirements of KCC Chapter 21A.26. A request for reconsideration of that decision was submitted by the Applicant on March 25, 2003. On March 27, 2003, the Hearing Examiner issued a notice of the Applicant's request and a stay of the time limit for appeal of the Examiner's March 14, 2003, decision. The order staying the time limit for appeal withdrew the March 14, 2003, decision.

Responses to the Applicant's request for reconsideration were filed by the Department of Development and Environmental Services on April 7, 2003 (titled "Motion For Reconsideration"), and by the Appellants on April 8, 2003.

(The following findings, nos. 2 through 16 are unchanged from the March 14, 2003, decision.)

2. The subject property is owned by Joe and Frances Finelli. It is in excess of 26.25 acres in size, and contains a variety of terrain that includes steep slopes. A residence was under construction at the time of application. A garage, farm building, well, and septic area, as well as a gravel drive and dirt access road, are also located on the property. Vegetation includes tall trees, and extensive dense brush growing in areas which were previously logged.

The Appellant's property is adjacent to the south of the Finelli property. It is currently undeveloped and contains a stand of trees approximately 140' in height.

3. Communication facilities are governed by King County Code Chapter 21A.26. The standards and process requirements of that chapter supersede all other review process, setback or landscaping requirements of the King County zoning code. KCC 21A.26.030. The proposed monopole is a minor communication facility, as defined by KCC 21A.06.215.
4. The Applicant's and the Appellant's properties are in an area of King County designated "rural" by the King County Comprehensive Plan. Both are in the RA zone classification, zoned RA-5.
5. Use of the subject property for a minor communication facility would be permitted outright if the development were consistent with the development standards set forth in KCC 21A.26.320. Development standards for minor communication facilities in rural areas include a 60-foot height limit and a setback of one foot for every one foot of height, although setbacks may be modified to achieve additional screening. Since the proposal exceeds those standards, the proposed use is required to be reviewed through the conditional use permitting process.
6. The decision criteria to be used in acting upon an application for a conditional use permit are set forth in Chapter 21A.44. The purposes of that chapter are consistent evaluation of land use applications and protection of nearby properties from the possible effects of those applications. Those purposes are to be accomplished by, among other things, "avoiding development which may be unnecessarily detrimental to neighboring properties; ...". KCC 21A.44.101.D.

A conditional use permit requires an applicant to demonstrate that:

- "A. The conditional use is designed in a manner which is compatible with the character and appearance of an existing, or proposed development in the vicinity of the subject property;
- "B. The location, size and height of...structures...shall not...discourage the permitted development or use of neighboring properties;
- "C. The conditional use is designed in a manner that is compatible with the physical characteristics of the subject property;
- "D. Requested modifications to standards are limited to those which mitigate impacts in a manner equal to or greater than the standards of this title,..." KCC 21A.44.040.

7. On September 13, 2002, the Department of Development and Environmental Services also issued a mitigated determination of non-significance for the proposed development. That determination found that the proposal does not pose a probable significant adverse impact to the environment provided the mitigation measures specified are applied as conditions of permit issuance. The MDNS was not appealed by any party. Condition D of the MDNS states, “Establish a substantial landscaping buffer, 30 feet, consisting of native vegetation that includes native conifers and deciduous tree species.”
8. KCC 21A.26.060 provides landscaping requirements for communication facilities. In the RA zone, the base of any transmission structure shall be landscaped with 10 feet of “Type 1” landscaping, as defined by KCC 21A.16.040A. When a security fence is used (which is part of the current proposal), climbing evergreen shrubs or vines capable of growing on the fence are required to supplement the landscaping. Required landscaping shall be planted as a yard improvement at or before the time of completion of the first structure or within a reasonable time thereafter. KCC 21A.26.060.A.3; 060.C.2; 060.D.

The director of DDES may waive or modify the landscaping provisions when existing vegetation on the site or along the site perimeter would preclude the ability to view the base of the tower. KCC 21A.26.060.F.

9. The Applicant proposes to afford an opportunity to other telecommunications companies to co-locate antennae on this monopole. Nextel Communications has expressed interest in using this site. The preponderance of the evidence indicates that the 150 foot height is necessary to provide adequate coverage of a reasonable area that will be served by the site. There are no other existing communication facilities or structure located within one quarter mile that are feasible for co-location of the VoiceStream antenna proposed for the subject property.
10. The Applicant’s stated purpose for requesting modification to the setback standards of KCC 21A.26.320 was to avoid removing or damaging trees located on the Applicant’s property. The Applicant also seeks to minimize the height of the structure needed to achieve the desired coverage.

The Department, when reviewing the application, did not consider alternative locations for the proposed monopole on the subject property.

11. The Examiner finds from a preponderance of the evidence (see exhibit 16 and the site plan, exhibit 3, sheet 6 of 19), that the proposed monopole could be located 150 feet north of the south property line of the subject property, and reasonably accomplish the purposes of the application. It appears that relocation to that area would require removal of one 6” diameter maple and possibly one or two 8” diameter maples. Location approximately 150 feet north of the south property line would meet the setback standards for minor communication facilities set forth in KCC 21A.26.320.
12. The condition use permit dated September 6, 2002 provides, as a condition of approval:

“Native vegetation shall be used for landscaping purposes from the southerly property line to the facility in the following numbers: 400 Douglas Fir seedlings and 200 Western Cedar seedlings for a total of 600 native seedlings.” (Exhibit 1, page 13, mitigation measure no. 5.)

It was the intent of the Department, and the understanding of the Applicant and Appellant, that the foregoing mitigation was intended as a substitute for the “Type 1” landscaping required by

KCC 21A.26.060. “Type 1” landscaping is described in KCC 21A.16.040 as a full screen that functions as a visual barrier. It is typically used between residential and non-residential areas, and is the most dense landscape type required by the King County Code.

The seedlings required by the Department as an alternative to “Type 1” landscaping are characterized in the Applicant’s landscape bond worksheet as “ground cover”. Planted five feet on center, as required by DDES, six to twelve years would pass before screening of the Applicant’s security fence and equipment at the base of the tower would be provided.

13. The Examiner finds from a preponderance of the evidence that the Applicant and the Department did not, prior to issuance of the subject permit, give substantial consideration to the impacts of the proposed cell tower on views from the adjacent and nearby RA properties to the south. The Applicant has failed to demonstrate that the proposed use is designed in a manner which is compatible with permitted and proposed development on adjacent and nearby property to the south. The proposed use would be more compatible with the character and appearance of existing and proposed development in the vicinity if the development met the setback standards of KCC 21A.26.320. Waiver of the setback requirements does not achieve greater levels of screening than that which would be available by using the setbacks stated in KCC 21A.26.320.
14. The Applicant has failed to demonstrate that the location of the proposed use does not discourage the permitted development or use of neighboring properties. The preponderance of the evidence is that use of the properties to the south is discouraged by the proposal.
15. The screening required by KCC 21A.26.060 would be substantially more effective than the alternative vegetation proposed by the Applicant and approved by the Department.
16. The Applicant has failed to demonstrate that the modifications to the standards of KCC 21A.26, as they relate to setbacks and screening, would mitigate impacts in a manner equal to or greater than the development standards specified in KCC Chapter 21A.26 for communication facilities. The preponderance of the evidence is that the modification would, in fact, mitigate impacts of the proposed development to a lesser extent than the standards set forth by that chapter.
17. The Department’s position that a remand of this application to the Department would serve no useful purpose has been modified by the Department’s motion for reconsideration. The Department’s current position is that the Hearing Examiner should make a decision on the conditional use permit, based upon information already in the record, or the Examiner should remand the matter to the Department for further action that is limited to relocating the monopole in a manner consistent with the Examiner’s March 14, 2003, decision, and approving only “Type 1” landscaping for the base of the structure.
18. The site plan and environmental checklist submitted by the Applicant for development at the location previously proposed does not provide sufficient information for a review of the proposal at alternative locations on the property. However, the environmental impacts and review of the proposal’s consistency with the criteria for approval of a conditional use permit at alternative locations, could be reviewed by DDES based upon additional information which the Department deems sufficient through consideration of either a revised application or a new application.

CONCLUSIONS:

Based upon the foregoing findings, the Examiner makes and enters the following conclusions:

(The following conclusions, nos. 1 through 6, are unchanged from the March 14, 2003, decision.)

1. The proposed development of the subject property with a minor communication facility, consisting of a 150-foot tall monopole to support cellular telephone antennae, is permitted subject to issuance of a conditional use permit. However, a conditional use permit shall be granted by King County only if the criteria of KCC 21A.44.040 are met. Based upon the foregoing findings, those criteria are not met in this case.
2. The standards and process requirements of KCC 21.26 must be applied when reviewing applications for communication facilities. It is the standards of this chapter that must be considered when reviewing this application. Based upon the foregoing findings, deviation from those standards is not justified in this case.
3. The proposed use is not designed in a manner which is compatible with existing and proposed residential development to the south of the subject property. Compliance with the setback and screening standards of Chapter 21A.26 would be more compatible with the development of the adjacent property to the south. It has not been demonstrated that such compliance is not reasonably possible.
4. The proposed location of the monopole on the subject property, and the screening vegetation proposed by the Applicant and approved by the Department, discourage the permitted development and use of adjacent and nearby properties to the south.
5. The requested modifications to the standards of KCC Chapter 21A.26, with respect to location of the monopole and its screening, do not mitigate impacts in a manner equal to or greater than the standards of the King County Zoning Code.
6. The proposed vegetative screening, consisting of evergreen and deciduous seedlings planted five feet on center, as substitute for the vegetative screening required by the King County code, would not establish a substantial landscaping buffer, as required by the MDNS. The proposed seedlings do not comply with any reasonable interpretation of “substantial landscaping buffer”.
7. The appeal by Inga Graff McNally and Tim McNally of the King County Department of Development and Environmental Services conditional use permit (“report and decision”) issued on September 13, 2002, should be GRANTED. The application for a conditional use permit which is the subject of that decision should be DENIED, without prejudice to the submission of a revised or new application which substantially meets the setback and screening standards of KCC Chapter 21A.26.
8. The Department of Development and Environmental Services should determine what, if any, additional information is needed for the review of a revised or new application pursuant to law, including the State Environmental Policy Act, and for consistency with the criteria for approving a conditional use permit in accordance with the applicable plans, policies and regulations of King County.

DECISION:

The appeal of Inga Graff McNally and Tim McNally of the September 13, 2002, conditional use permit, issued to Odelia Pacific for VoiceStream Wireless, is GRANTED. The application for conditional use permit which is the subject of DDES File L01CU023 is DENIED, without prejudice to the submission by the Applicant of a revised or new application for development of a minor communication facility on the subject property that is substantially consistent with the setback and screening requirements of KCC Chapter 21A.26.

Note: The Appellant's response to motion for reconsideration filed on April 8, 2003, contains material not admitted into the record. This material has not been read or considered by the Hearing Examiner.

An appeal, if any, from the decision by the Department on a revised or new application shall be processed as a new appeal; provided, however, that if the Department's decision is based upon a revised (rather than new) application, the foregoing findings and conclusions, to the extent applicable, shall be considered as the law of the case.

ORDERED this 11th day of April, 2003.

James N. O'Connor
Hearing Examiner Pro Tem

TRANSMITTED this 11th day of April, 2003, to the following parties and interested persons:

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Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding conditional use permit appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE MARCH 4 and 5, 2003 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L01CU023

James N. O'Connor was the Hearing Examiner in this matter. Participating in the hearing were Chad Tibbits, Timothy Barnes, and Greg Borba representing the Department; Paul Wozniak and Steve Caplan representing the Applicant; Jane Koler representing the Appellant; and Tim and Inga McNally, Nadine Butler, Ned Collins, Dan Wilson and Darren Anhalt.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 DDES Conditional Use Permit (CUP) Report and Decision dated September 13, 2002
- Exhibit No. 2 DDES Supplemental Report to the Hearing Examiner
- Exhibit No. 3 Revised Project Plans (CUP Exhibit D-7) dated August 7, 2002
- Exhibit No. 4 Applicant Justification/Criteria for Approval (CUP Exhibit D-3)
- Exhibit No. 5 Applicant Radio Frequency Letter and Coverage Maps dated November 16, 2001 (CUP Exhibit D-13)
- Exhibit No. 6 Applicant Community Meeting Summary (CUP Exhibit D-16)
- Exhibit No. 7 DDES File No. L01CU023
- Exhibit No. 8 Map indicating where each property lies
- Exhibit No. 9 Letter from Inga McNally dated March 4, 2002
- Exhibit No. 10a Site Plan Map, C-1 from DDES File
- Exhibit No. 10b Blowup of a Portion of 10a
- Exhibit No. 11 Photograph showing power poles along Issaquah-Fall City Rd., taken March 1, 2003
- Exhibit No. 12 Photograph showing clearing where tower will be located and trees on McNally property that will be cut down
- Exhibit No. 13 Photograph showing the view from McNally homesite where tower will be and trees on McNally property that will be cut down
- Exhibit No. 14 Not admitted into the record
- Exhibit No. 15 Photograph showing Collins house from the Finelli/McNally property line
- Exhibit No. 16 Site plan from Odelia Pacific
- Exhibit No. 17 Site plan photographs taken by Voicestream Wireless
- Exhibit No. 18 Predictions generated by Team Mobile's computer indicating what coverage exists without this proposal
- Exhibit No. 19 Predictions generated by Team Mobile's computer indicating what coverage exists with this proposal
- Exhibit No. 20 Appellant's drawing showing the location of the McNally house located on Exhibit 16
- Exhibit No. 21 Photographs (2) taken for the proposed home location for the McNally's looking

- North toward the site
- Exhibit No. 22 Photographs (3) showing the existing condition, one of site if built, and the third with a five year growth of some of the 600 trees
- Exhibit No. 23 Photograph showing the visual impact that the tower would have looking southwest
- Exhibit No. 24 Photograph showing the agricultural building behind some of the trees on the south side of the McNally property
- Exhibit No. 25 Photographs (2) showing the agricultural building on opposite side of trees looking south
- Exhibit No. 26 Photographs (2) looking east showing the substantial screening of the project
- Exhibit No. 27 Photographs (2) looking west showing project is in a cluster of trees
- Exhibit No. 28 Map showing the landscape plan
- Exhibit No. 29 Deposition of Chad Tibbits – Not admitted into the record
- Exhibit No. 30 Pages 53 & 54 from Deposition of Chad Tibbits

JOC:ms

L01CU023 RPT2